

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9454 / September 23, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70473 / September 23, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3674 / September 23, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30694 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of

**DONALD J. ANTHONY, JR.,
FRAND H. CIAPPONE,
RICHARD D. FELDMANN,
WILLIAM P. GAMELLO,
ANDREW G. GUZZETTI,
WILLIAM F. LEX,
THOMAS E. LIVINGSTON,
BRIAN T. MAYER,
PHILIP S. RABINOVICH, and
RYAN C. ROGERS,**

Respondents.

**ANSWER TO ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS**

Defendant Thomas Livingston ("Livingston") files this Answer to the Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP"), and respectfully states as follows:

I. ANSWER

Each paragraph of this Answer corresponds directly to the same numbered paragraph in the OIP.

As to Section I, Livingston denies that this public administrative and cease-and-desist proceeding is appropriate and in the public interest.

1. The allegations in paragraph 1 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 1.

2. The allegations in paragraph 2 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 2.

3. The allegations in paragraph 3 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 3.

4. The allegations in paragraph 4 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 4.

5. The allegations in paragraph 5 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 5.

6. The allegations in paragraph 6 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 6.

7. Livingston admits the allegations in the first sentence of paragraph 7 of the OIP. Livingston further admits that he was registered with MS & Co. from October 1988 to December 2009. Livingston denies the remaining allegations paragraph 7 of the OIP.

8. The allegations in paragraph 8 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 8.

9. The allegations in paragraph 9 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 9.

10. The allegations in paragraph 10 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 10.

11. The allegations in paragraph 11 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 11.

12. Livingston denies that he acquired a 20% ownership interest in MS Advisors when he acquired a 20% ownership interest in MS & Co. in 2004. Livingston is not aware that he ever subsequently acquired a 20% interest in MS Advisors, therefore Livingston denies the allegations concerning his ownership interest contained in paragraph 12 of the OIP. Livingston is without sufficient knowledge or information to form a belief as to the truth of the remaining matters asserted in this paragraph and, therefore, the allegations are deemed denied.

13. Livingston denies that he acquired a 20% ownership interest in MS Holdings when he acquired a 20% ownership interest in MS & Co. in 2004. Livingston is not aware that he ever subsequently acquired a 20% interest in MS Holdings, therefore Livingston denies the allegations concerning his ownership interest contained in paragraph 13 of the OIP.

14. The allegations in paragraph 14 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 14.

15. The allegations in paragraph 15 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 15.

16. The allegations in paragraph 16 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 16.

17. The allegations in paragraph 17 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 17.

18. The allegations in paragraph 18 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 18.

19. The allegations in paragraph 19 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 19.

20. Livingston denies the allegations contained in paragraph 20 of the OIP.

21. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

22. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

23. Livingston denies the allegations contained in paragraph 23 of the OIP.

24. Livingston denies the allegations contained in paragraph 24 of the OIP.

25. Livingston denies the allegations contained in the first sentence of paragraph 25 of the OIP. Livingston admits the remaining allegations contained in paragraph 25 of the OIP.

26. Livingston admits the allegations contained in paragraph 26 of the OIP.

27. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

28. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

29. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in the first and last sentences in this paragraph and, therefore, the allegations are deemed denied. Livingston denies the allegations contained in the second sentence of paragraph 29 of the OIP.

30. The allegations in paragraph 30 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 30.

31. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

32. Livingston is without sufficient knowledge or information to form a belief as to the truth of the factual matters asserted in this paragraph and, therefore, the allegations are deemed denied. Livingston denies the Trust offerings can be integrated for purposes of Rule 506's limitation on unaccredited investors and, therefore, denies the allegations in the last sentence of paragraph 32 of the OIP.

33. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

34. Paragraph 34 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies the allegations contained in paragraph 34 of the OIP.

35. Paragraph 35 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies the allegations contained in paragraph 35 of the OIP.

36. Paragraph 36 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies the allegations contained in paragraph 36 of the OIP.

37. Paragraph 37 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies the allegations contained in paragraph 37 of the OIP.

38. Livingston denies the allegations contained in paragraphs 38 and 38(a)-(d) of the OIP.

39. Livingston denies the allegations contained in paragraph 39 of the OIP.

40. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

41. Livingston denies the allegations contained in paragraph 41 of the OIP.

42. Livingston denies the allegations contained in paragraph 42 of the OIP.

43. Livingston denies the allegations contained in paragraph 43 of the OIP.

44. Livingston denies the allegations contained in paragraph 44 of the OIP.

45. Livingston denies the allegations contained in paragraph 45 of the OIP.

46. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

47. Livingston denies the allegations contained in paragraph 47 of the OIP.

48. Livingston is without sufficient knowledge to admit or deny the allegations contained in paragraph 48 of the OIP, and accordingly same are denied.

49. Livingston is without sufficient knowledge to admit or deny the allegations contained in paragraph 49 of the OIP, and accordingly same are denied.

50. Livingston denies the allegations contained in paragraph 50 of the OIP.

51. Livingston is without sufficient knowledge or information to form a belief as to the truth of the matters asserted in this paragraph and, therefore, the allegations are deemed denied.

52. The allegations in paragraph 52 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 52.

53. The allegations in paragraph 53 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 53.

54. The allegations in paragraph 54 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 54.

55. The allegations in paragraph 55 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 55.

56. The allegations in paragraph 56 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 56.

57. Livingston denies the allegations contained in paragraph 57 of the Complaint.

58. The allegations in paragraph 58 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 58.

59. The allegations in paragraph 59 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 59.

60. The allegations in paragraph 60 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 60.

61. The allegations in paragraph 61 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 61.

62. The allegations in paragraph 62 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 62.

63. The allegations in paragraph 63 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 63.

64. The allegations in paragraph 64 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 64.

65. The allegations in paragraph 65 are not directed to Livingston and, therefore, no answer is required. To the extent required, Livingston denies the allegations contained in paragraph 65.

66. Paragraph 66 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies that he violated the statutes alleged in paragraph 66.

67. Paragraph 67 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies that he violated the statutes and rules alleged in paragraph 67.

68. Paragraph 68 contains a legal conclusion that does not require an answer. To the extent an answer is required, Livingston denies that he violated the statutes and rules alleged in paragraph 68.

As to Sections III and IV of the OIP, no answer is required. To the extent an answer is required, Livingston denies the allegations in Sections III and IV of the OIP, denies that he violated any securities laws or regulations, and denies that any action should be taken against him.

II. AFFIRMATIVE DEFENSES

Livingston incorporates by reference the foregoing paragraphs in their entirety and asserts the following Affirmative Defenses. By asserting these affirmative defenses, Livingston does not admit that he bears the burden of proof on any issue, and does not accept any burden he would not otherwise bear. Livingston reserves the right to amend this Answer with additional defenses as further information becomes available.

FIRST AFFIRMATIVE DEFENSE

The OIP fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Division of Enforcement fails to plead fraud or scienter with particularity.

THIRD AFFIRMATIVE DEFENSE

Livingston did not participate in any unlawful conduct. The claims alleged by the Division of Enforcement were the direct and proximate result of the acts/or omissions of others

over whom Livingston had no control and for whose acts and omissions Livingston is not responsible, whether or not named as parties to this action.

FOURTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or in part, to the extent that any alleged misrepresentations or omissions would not have been deemed "material" by a reasonable investor in light of the totality of the circumstances.

FIFTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or in part, on the grounds that Livingston did not at any time act with the intent to deceive, manipulate, or defraud investors or anyone.

SIXTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or in part, to the extent that they seek to impose upon Livingston disclosure obligations that are inconsistent with those imposed pursuant to the federal securities laws.

SEVENTH AFFIRMATIVE DEFENSE

At all times mentioned in the OIP and with respect to all matters contained therein, Livingston acted in good faith, and did not know, and in the exercise of reasonable care could not have known, of any misrepresentation, misleading statement or omission alleged in the OIP.

EIGHTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or part, applicable by statute of limitations, including 28 U.S.C. § 2462, and/or the doctrine of laches.

NINTH AFFIRMATIVE DEFENSE

The Division of Enforcement fails to plead mental state with particularity.

TENTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or part, by the doctrines of collateral estoppel and/or res judicata.

ELEVENTH AFFIRMATIVE DEFENSE

The Division of Enforcement's claims are barred, in whole or part, to the extent MS & Co. had in place a reasonable and proper system of supervision and internal control, and Livingston reasonably and in good faith relied on such institutional processes to ensure adequate and appropriate legal review, disclosure of material information, and compliance.

TWELFTH AFFIRMATIVE DEFENSE

The OIP fails to allege the existence of any material misstatement or omission specifically made by Livingston.

THIRTEENTH AFFIRMATIVE DEFENSE

Livingston reserves the right to add affirmative defenses as he deems necessary to his defense during or upon completion of discovery and/or to assert any defenses asserted by any other defendants and/or allowed by applicable law.

III. PRAYER FOR RELIEF

WHEREFORE, Livingston respectfully prays that the these proceedings be dismissed, with prejudice, and Livingston be awarded such other and further relief as may be deemed just and proper.

Dated: November 18, 2013

By: 

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Respondents.

**MOTION FOR A MORE DEFINITE
STATEMENT**

Pursuant to 17 C.F.R. § 201.220(d), Defendant Thomas Livingston ("Livingston") files this Motion for a More Definite Statement, and respectfully states as follows:

The allegations asserted in the Order Instituting Proceedings ("OIP"), which span several years and are replete with "group pleadings," do not provide Livingston with sufficient notice of the factual or legal bases of the claims asserted against him sufficient to enable Livingston to prepare his answers and defenses. Livingston hereby joins the motions for more definite

statements filed by the other Respondents for the reasons set forth therein, and request that the same matters be specifically pled as to the allegations asserted against Livingston. In addition, Livingston respectfully requests a more definite statement as to the following:


1. Neither the OIP, the charts that the Division provided on October 23, 2013 (true and correct copies of which are attached hereto as Exhibit A), nor the Second Disclosure to Respondents Pursuant to Request for More Definite Statement provided by the Commission (a true and correct copy of which is attached hereto as Exhibit B) identify any affirmative misrepresentation allegedly made by Livingston. If the Commission asserts any claims against Livingston based on alleged misrepresentation, it must identify each alleged misrepresentation at issue, the security as to which such alleged misrepresentation was made, when and to whom the misrepresentation was allegedly made, why the statement constitutes a misrepresentation, and how the alleged misrepresentation was material.

2. There is insufficient information to evaluate Section 5 claims relating to the Trust Offerings. The Division admits that “[n]one of the Trust Offerings exceeded 35 unaccredited investors.” *See* OIP ¶ 32. Instead, the Division alleges that “[w]hen integrated...Rule 506’s limitation on unaccredited investors was breached.” *Id.* Even assuming such “integration theory” is permissible (which Livingston denies), the Division has failed to provide sufficient information to allow Livingston to adequately prepare his answers and defenses with regard to this claim. The Division previously stated that it expects to provide the Respondents with a list of unaccredited investors in the Trust offerings listed in paragraph 31 of the OIP (*see* Ex. B), but has not yet done so. In addition, to the extent such a list includes investors for whom the Division has not produced information sufficient to determine whether the investor was accredited, the Division should also provide such information.

3. Paragraph 45 of the OIP states that the "Respondents learned of the [Redemption] policy at different times beginning in late 2006," then alleges certain actions taken thereafter were wrongful because the Respondents had knowledge of the alleged "Redemption Policy." Such "group pleading" is insufficient to allow Livingston to evaluate his answers and defenses to this claim. Livingston respectfully requests that the Division identify what date it contends he learned of the "Redemption Policy."

4. Page 7 of the Second Disclosure to Respondents Pursuant to Request for More Definite Statement states that "Livingston invested a customer's \$25,000 inheritance in a Trust offering, despite the customer's instructions to put the funds in a money market account." See Ex. B. Livingston cannot answer or defend this claim without knowing which customer these allegations relate to or, at the very least, what Trust offering the funds were allegedly placed in.

Dated: November 18, 2013

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